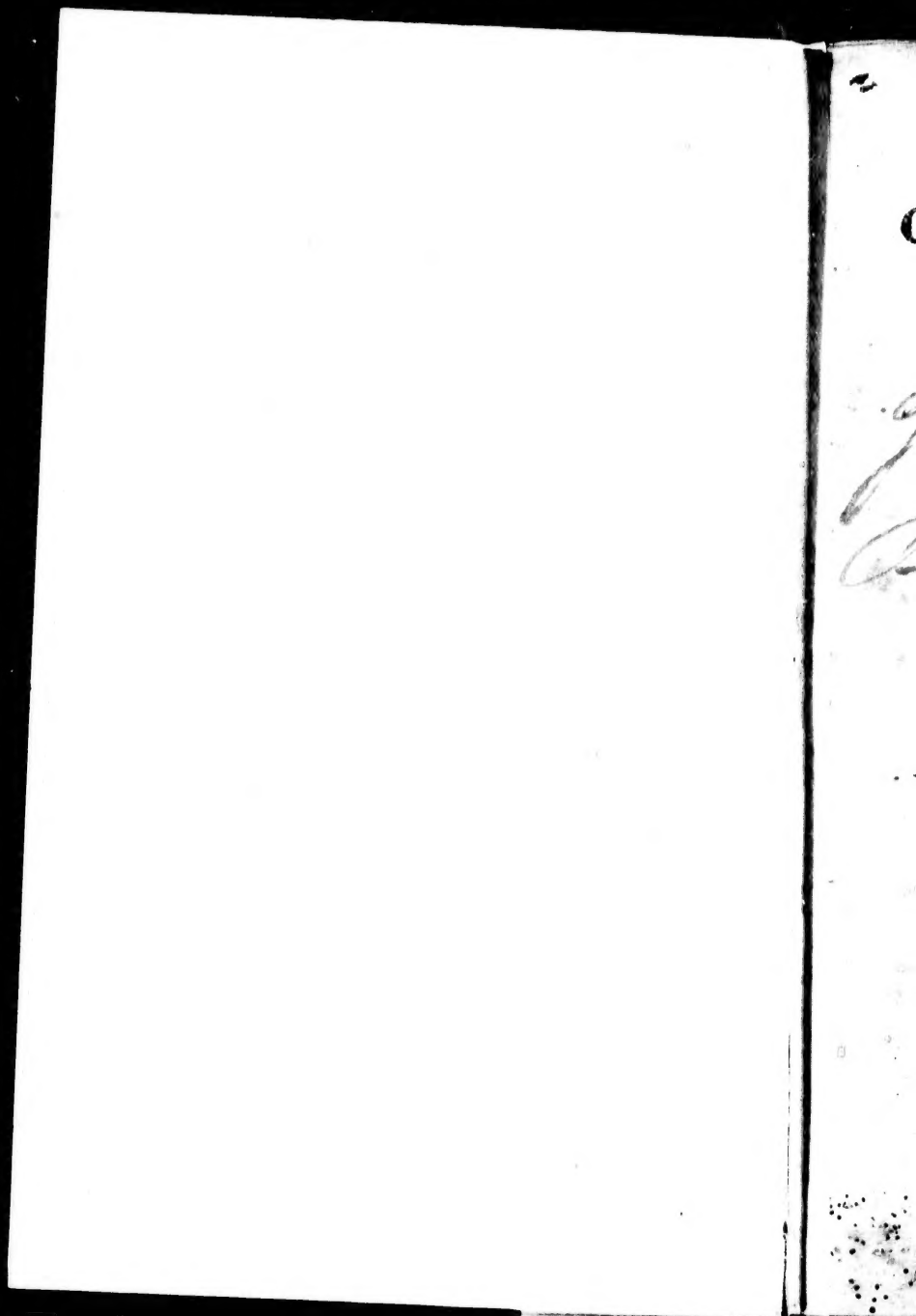




THE
CANADIAN'S RIGHT

THE SAME AS THE
ENGLISHMAN'S.

John Doe
Book *York*

A DIALOGUE
BETWEEN A
BARRISTER AT LAW,
AND
A JURYMAN.

SETTING FORTH THE ANTIQUITY, EXCELLENT DESIGN, USE, OFFICE, AND JUST PRIVILEGES OF
JURIES,

By the Law of England.

FIRST WRITTEN
BY SIR JOHN HAWLES, KNIGHT,
SOLICITOR GENERAL TO WILLIAM III.

NOW REPUBLISHED
BY CHARLES FOTHERGILL, Esq.
York, U. C. 1823

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PREFACE

TO THE ENGLISH EDITION.



AS the security of our persons, our reputations, our properties, and our liberties, depends upon JURORS, it can never be unseasonable to inform or remind them of their DUTIES. While they remain ignorant of the nature of their station, they cannot determine with propriety; while they feel not its importance, they will not conduct themselves with spirit. When questions, however, which relate to the welfare of the PEOPLE, are agitated in Courts of Justice, Instructions of this kind become of more than ordinary importance. Errors upon these occasions may be attended with fatal consequences, since powers will be introduced which may, in the end, overturn the Constitution.

BUT it is not upon the good intentions of Jurymen only that we must depend. If they should be prevented, either by fraud or

force, from discharging the trust reposed in them, their endeavours will avail little to the protection of the subject. Their *rights* ought, therefore, to be guarded against all attacks, especially as men of great eminence in the law have publickly declared that they have lately been invaded:—and to be defended, they must be understood.

A knowledge, then, of whatever relates to the office of Juries, seems at this time essentially necessary, since from hence alone can arise the proper execution of its duties and the preservation of its rights.—To promote this end, the following Pamphlet is now republished. Its character for perspicuity and strength of reasoning, is so well established, that it is needless to enlarge upon it here.—If it meets the success which its merit deserves, it will, perhaps, be a principal means of preserving the trial by Jury, in its full force, to posterity.

ADVERTISEMENT

TO THE ENGLISH READER.



THIS Treatise has passed through many editions. It appeared first in the year 1680; it was reprinted in the year 1731, and again in 1752, 1763, 1764, 1770, and 1771; and is now presented to the Public at least for the EIGHTH time.

N. B. Many circumstances might lead the reader to suspect, that this Dialogue has been altered in order to accomodate the present times. This edition, however, has been carefully collated with the *First*, which was printed in London, for Richard Janeway, in Queen's Head Alley, Pater-noster-Row, in the year 1680. So scrupulously has the original been adhered to, that not a single word has been altered,

except in the translation of the Latin sentences in page 3d, the latter of which was before unintelligible. Liberties, indeed, have been taken with the orthography and pointing, but these have not in the least affected the sense.

TO
THE PEOPLE OF CANADA.

I KNOW not that I could make you a more valuable offering than this little book; which, having produced the greatest benefit in England, cannot fail, if read with attention, to be of the same service here.

I have observed with pain that the ends of Justice are frequently obstructed or delayed, and sometimes wholly defeated, through the ignorance of Juries as to what concerns their rights, duties, and privileges. By this dangerous ignorance, the most iniquitous suits have been often gained, and innocent men have suffered. The TRIAL BY JURY is the most glorious institution of our country.—It is that by which our lives, our liberties, and our property are secured. Yet what avails this great right, if you continue to slumber in ignorance of its true nature and power?—Read this book, and read it with attention. Let its contents sink so deeply into your minds, that they may never be forgotten, and you will be always ready to confront and defeat the mal-practices of the law, and even to correct the Judge on the bench, should he be forgetful of his duty, or wilfully partial. Let this

book have its place next to your BIBLE, and let it be studied nearly as often. I hope it will be found in every cottage in the country. It is not published for the sake of gain, but *to do good*; it is, therefore, sold at a price so low that every one may have it.—I trust it will get into every family, and be alike the study of rich and poor, old and young, for I believe it is alone capable of giving a high character to your country, and of enabling you to raise up an impenetrable bulwark against oppression and injustice, and against the arbitrary power of corrupt Judges, (should you ever be cursed with so great a curse,) and all the artful twistings and shiftings, sherking and quirk-ing, of the wicked or subtle lawyer.

If you make good use of your RELIGIOUS TOLERATION;—If you fully understand, and know how to exercise, the invaluable rights connected with the TRIAL BY JURY; and, if you take care to keep a watchful eye on the conduct of your Representatives in Parliament, being cautious whom you send there;—with that rich, and beautiful, and extensive country which God has given you—it will be your own fault, and that of your children, if Canada does not take the highest rank amongst those nations which are destined to cover the American continent.

That it may be so, is the fervent prayer of

Your Devoted Humble Servant,

CHARLES FOTHERGILL.

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THE CANADIAN'S RIGHT,

&c. &c. &c.

Barrister.

MY old Client! a good morning to you. Whither so fast? you seem intent upon some important affair.

Jurymen. Worthy Sir! I am glad to see you thus opportunely, there being scarce any person that I could at this time rather have wished to meet with.

Barr. I shall esteem myself happy, if in any thing I can serve you.—The business, I pray?

Jurym. I am summoned to appear upon a Jury, and was just going to try if I could get off. Now I doubt not but you can put me into the best way to obtain that favour.

Barr. It is probable I could: but first let me know the reasons why you desire to decline that service.

Jurym. You know, Sir, there is something of trouble and loss of time in it:—and men's lives, liberties, and estates, (which depend upon a Jury's *guilty*, or *not guilty*, for the plaintiff, or for the defendant,) are weighty things. I would not wrong my conscience for a world, nor be necessary to any man's ruin. 'There' are others better skilled in such matters. I have ever

■

so loved peace, that I have forborne going to law (as you well know) many times, though it hath been much to my loss.

Barr. I commend your tenderness and modesty; yet must tell you, these are but general and weak excuses.—As for your *time* and *trouble*, it is not much; and, however, can it be better spent than in doing justice, and serving your country? To withdraw yourself in such cases is a kind of sacrilege,—a robbing of the public of those duties which you justly owe it. The more *peaceable* man you have been, the more fit you are: for the office of a Juryman is, conscientiously to judge his neighbour; and needs no more law than is easily learnt to direct him therein. I look upon you, therefore, as a man well qualified with estate, discretion, and integrity; and if all such as you should use private means to avoid it, how would the king and country be honestly served? At that rate we should have none but fools or knaves entrusted in this grand concern, on which, (as you well observe) the lives, liberties, and estates of all England depend.

Your *tenderness not to be accessory* to any man's being wronged or ruined, is, as I said, much to be commended. But may you not incur it unawares, by seeking thus to avoid it? *Pilate* was not innocent because he washed his hands and said, 'He would have nothing to do with the blood of that just one.' There are faults of omission as well as commission. When you are legally called to try such a cause, if you shall shuffle out yourself, and thereby persons perhaps less conscientious happen to be made use of, and so a villain escapes justice, or an innocent man is ruined, by a prepossessed or negligent verdict; can you think yourself in such

a case wholly blameless? *Qui non prohibet cum potest, jubet*: That man abets an evil, who prevents it not, when it is in his power. *Nec caret scrupulo societatis occultae, qui evidenter facinorosi definit olviare*: Nor can he escape the suspicion of being a secret accomplice, who evidently declines the prevention of an atrocious crime.

Jurym. Truly, I think a man is *bound* to do all the good he can; especially when he is lawfully called to it. But there sometimes happen nice cases, wherein it may be difficult to discharge one's conscience without incurring the displeasure of the court, and thence trouble and damage may arise.

Barr. That is but a vain and needless fear. For, as the jurors' privileges (and every Englishman's in and by them) are very considerable; so the laws have no less providently guarded them against invasion or usurpation. So that there needs no more than, first, understanding to know your duty; and, in the next place, courage and resolution to practise it with impartiality and integrity, free from accursed bribery and malice, or (what is full as bad in the end) base and servile fear.

Jurym. I am satisfied, that as it is for the advantage and honour of the *public*, that men of understanding, substance, and honesty, should be employed to serve on juries, that *justice* and *right* may fairly be administered; so it is *their own interest*, when called thereunto, readily to bestow their attendance and service, to prevent *ill precedents* from men otherwise qualified; which may by degrees fatally, though insensibly, undermine our just birth-rights, and perhaps fall heavy one day upon us, or our posterity. But, for my own part, I

am fearful lest I should suffer through my ignorance of the duty and office of a Juryman; and therefore, on that account principally it is, that I desire to be excused in my appearance; which if I understood but so well as I hope many others do, I would with all my heart attend the service.

Barr. You speak honestly, and like an Englishman. But if that be all your cause of scruple, it may soon be removed, if you will but give yourself a very little trouble of enquiry into the necessary provisions of the law of England relating to this matter.

Jurym. There is nothing, of a temporal concern, that I would more gladly be informed in; because I am satisfied it is very expedient to be generally known. And first, I would learn *how long* trials by Juries have been used in this nation.*

Barr. Even time out of mind;—so long, that our best historians cannot date the origin of the institution; being indeed cotemporary with the nation itself, or in use as soon as the people were reduced to any form of civil government, and administration of justice. Nor have the several conquests or revolutions, the mixtures of foreigners, or the mutual feuds of the natives, at any time been able to suppress or overthrow it. For,

I. That Juries (the thing in effect and substance, though perhaps not just the number of twelve men,) were in use among the Britons, the first inhabitants of

* Our author in his title page, told us, that he intended to point out, with respect to juries, 1st. their Antiquity; 2d. their Excellent Designed Use; 3d. their Office and Just Privileges. In answer to the Jurymen's question, and in compliance with his own promise, he is now going to treat of the Antiquity of Juries.

this island, appears by the ancient monuments and writings of that nation; attesting that their Freeholders had always a share in all trials and determinations of differences.

II. Most certain it is, that they were practised by the Saxons,* and were then the only courts, or at least an essential, and the greater part of all the courts of judicature: for so, to omit a multitude of other instances, we find in King Ethelred's Laws, "*In singulis Centuriis, &c.*" "In every hundred let there be a court, and let twelve ancient freemen, together with the Lord, or rather, according to the Saxon, the Gréve, i. e. the chief magistrate amongst them, be sworn, that they will not condemn any person that is innocent, nor acquit any one that is guilty."

III. When the Normans came in, William, though commonly called 'the Conqueror,' was so far from abrogating this privilege of Juries,† that in the fourth year of his reign, he confirmed all King Edward the Confessor's laws, and the ancient customs of the kingdom, whereof this was an essential and most material part. Nay, he made use of a Jury chosen in every county, to report and certify on their oaths what those laws and customs were; as appears in the proem of such his confirmation.

IV. Afterwards when the Great Charter, commonly called Magna Charta, which is nothing else than a recital, confirmation, and corroboration of our ancient

* Lamb, p. 218. Coke, 1st Part, Institutes, fol. 155.

† See Spelman's Glossar. in the word *Jurata*.

English liberties, was made and put under the great seal of England, in the ninth year of King Henry the Third, which was *anno Domini* 1225 ; then was this privilege of trials by Juries in an especial manner confirmed and established ; as in the fourteenth chapter, " That no amercements shall be assessed, but by the oath of good and honest men of the vicinage." And more particularly in that golden nine-and-twentieth chapter,—" No freeman shall be taken or imprisoned nor be disseised of his freehold or liberties, or free customs, or be outlawed, or exiled, or any other way destroyed ; nor shall we pass upon him, or condemn him but by the lawful judgment of his peers," &c. Which Grand Charter having been confirmed by above thirty acts of Parliament, the said right of Juries thereby, and by constant usage, and common custom of England, which is the common law, is brought down to us as our undoubted birth-right, and the best inheritance of every Englishman. For as that famous lawyer, Chief Justice Coke,* in the words of Cicero, excellently avers, '*Major hæreditas venit unicuique nostrum a jure et legibus, quam a parentibus.*' 'It is greater inheritance, and more to be valued, which we derive from the fundamental constitution and laws of our country, than that which comes to us from our respective parents ;' for without the former, we have no claim to the latter.

Jurym. But has this method of trial never been attempted to be invaded or justled out of practice ?

Barr. It is but rarely that any have arrived to so

* 2 Instit. fol. 56.

great a confidence ; ' for it is a most dangerous thing to shake, or alter, any of the rules, or fundamental points of the common law, which in truth are the main pillars, and supporters of the fabric of the commonwealth : ' these are Judge *Coke's* words.* Yet sometimes it has been endeavoured ; but so sacred and valuable was the institution in the eyes of our ancestors, and so tenacious were they of their privileges, and zealous to maintain, and preserve such a vital part of their birth-right and freedom, that no such attempts could ever prove effectual, but always ended with the shame and severe punishment of the rash undertakers. For example,

1. *Andrew Horn*, an eminent lawyer, in his book, entitled, *The Mirror of Justices*, written in the reign of King *Edward I.* now near 400 years ago, in the fifth chapter, and first section, records, That the renowned *Saxon King Alfred* caused four-and forty justices to be hanged in one year, as murderers, for their false judgments. And there recites their particular crimes, most of them being in one kind or other infringements, violations, and encroachments of and upon the rights and privileges of Juries. Amongst the rest, that worthy author tells us, " he hanged one Justice Cadwine, because he judged one Hackwy to death without the consent of all the Jurors ; for whereas he stood upon his Jury of twelve men, because three of them would have saved him, this Cadwine removed those three, and put others in their room on the Jury, against the

* 2 Institute p. 74.

said Hackwy's consent." Where we may observe, that though at last twelve men did give a verdict against him, yet those, so put upon him, were not accounted his Jurors; by reason all, or any of them, who were first sworn to try him, could not, by law, be removed, and others put in their stead: and that such illegal alteration was then adjudged a capital crime, and forthwith the said Cadwine was hanged.

2. A second instance I shall give you in the words of the Lord Chief Justice Coke*; 'against this ancient and fundamental law, and in the face thereof, there was in the eleventh year of King Henry VII. chap. 3. an act of Parliament obtained, on fair pretences, and a specious preamble, as to avoid divers mischiefs, &c. whereby it was ordained, "that from thenceforth, as well justices of assize, as justices of the peace, upon a bare information for the king before them made, without any finding or presentment by the verdict of twelve men, should have full power and authority, by their discretions, to hear and determine all offences and contempts committed or done by any person or persons against the form, ordinance, or effect of any statute made and not repealed, &c." by colour of which act (saith Coke) shaking this fundamental law, he means, touching all trials to be by Juries, it is not credible what horrible oppressions and exactions, to the undoing of multitudes of people, were committed by Sir Richard Empson knight, and Edward Dudley, Esq. being justices of the peace, throughout England; and upon this unjust and injurious

* Coke, 2d part of Inst. fol. 61.

act, as commonly in like cases it falleth out, a new office was erected, and they made masters of the king's forfeitures.'

But not only this statute was justly, soon after the decease of Henry VII. repealed by the stat. of the 1 Hen. VIII. chap. 6. but also the said Empson and Dudley, notwithstanding they had such an act to back them, yet it being against Magna Charta, and consequently void, were fairly executed for their pains; and several of their under-agents, as promoters, informers, and the like, severely punished, for a warning to all others that shall dare, on any pretence whatsoever, infringe our English liberties *. For so the lord † Coke having, elsewhere, with detestation mentioned their story, pathetically concludes, '*Qui eorum vestigiis instant, exitum per horresca t.*' 'Let all those who shall presume to tread their steps, tremble at their dreadful end.' Other instances of a later date might be given, but I suppose these may suffice.

Jury. Yes, surely; ‡ and by what you have discoursed of the long continued use of Juries, and the zealous regards our ancestors had not to part with them, I perceive that they were esteemed a special privilege. Be pleased, therefore, to acquaint me, wherein the excellency and advantages to the people, by that method of trial above others, may consist.

* See Sir Rich. Baker's Chron. p. 251, printed in 1674.

† 4 part Institut. fol. 41

‡ The Juryman having been instructed in the antiquity of Juries, is now going to enquire wherein their advantage consists. The Barrister accordingly shews the benefits which may arise from them. Thus the author performs the second part of what he proposed in the title page.

Barr. This question shows you have not been much conversant abroad, to observe the miserable condition of the poor people in most other nations, where they are either wholly subject to the despotic arbitrary lust of their rulers, or at best under such laws as render their lives, liberties, and estates, liable to be disposed of at the discretion of strangers appointed their judges; most times mercenary, and creatures of prerogative; sometimes malicious and oppressive; and often partial and corrupt*. Or suppose them ever so just and upright, yet still has the subject no security against the attacks of unconscionable witnesses. Yea, where there is no sufficient evidence, upon bare suspicions, they are obnoxious to the tortures of the rack, which often make an innocent man confess himself guilty, merely to get out of present pain. Is it not then an inestimable happiness to be born, and live under such a mild and righteous constitution, wherein all these mischiefs, as far as human prudence can provide, are prevented? where none can be condemned, either by the power of superior enemies, or the rashness or ill-will of any judge, nor by the bold affirmations of any profligate evidence: but no less than twelve honest substantial, impartial men, his neighbours, who consequently cannot be presumed to be unacquainted either with the matters charged, the prisoner's course of life, or the credit of the evidence, must first be fully satisfied in their consciences, that he is guilty; and so all un-

* See all this excellently made out, and more at large, by the L. C. J. Fortescue, afterwards chancellor to K. Hen. VI. in his Book De laudibus Legum Angliæ cap. 26, 27, 28, 29.

animously pronounce him upon their oaths? Are not these, think you, very material privileges?†

Jurym. Yes, certainly; though I never so well considered them before. But now I plainly see our forefathers had, and will still have, all the reason in the world to be zealous for the maintenance and preservation thereof from subversion or encroachments, and to transmit them entire to posterity. For, if once this bank be broken down or neglected, an ocean of oppression, and the ruins of infinite numbers of people, (as in Empson and Dudley's days) may easily follow, when on any pretence they may be made criminals, and then fined in vast sums, with pretext to enrich the king's coffers, but indeed to feed those insatiate vultures that promote such unreasonable prosecutions. But since you have taught me so much of the antiquity and excellency of Juries, I cannot but crave the continuance of your favour, to acquaint me somewhat more particularly of their office and power by law.

Barr. ‡ I shall gladly comply with so reasonable and just a request. † 'A jury of twelve men are by our laws the only proper judges of the matter in issue before them.' As for instance,

I. That testimony which is delivered to induce a Jury to believe, or not to believe, the matter of fact in

† It may be of importance to add one observation here:— Though a parliament, to supply the necessities and purposes of an abandoned administration, should oppress us with taxes, while the constitution remains, in other respects, unviolated, the continuance of Juries in their legal force will secure our reputations, our personal liberties, our limbs, and our lives.

‡ The author now proceeds to the execution of the third, and last part of his proposed plan.

† See *Coke*, 4th part of *Instit.* fol. 84.

issue, is called in law, Evidence ; because thereby the Jury may, out of many matters of fact, *Evidere veritatem* ; that is, see clearly the truth, of which they are proper judges.

II. When any matter is sworn, or [when a] deed [is] read, or offered, whether it shall be believed, or not, or whether it be true, or false, in point of fact, the Jurors are proper judges.

III. Whether such an act was done, in such, or such a manner, or to such, or such, an intent, the Jurors are Judges. For the court is not a judge of these matters, which are evidence to prove, or disprove, the thing in issue. And therefore the witnesses are always ordered to direct their speech to the Jury ; they being the proper judges of their testimony. And in all pleas of the crown, or matters criminal, the prisoner is said ' to put himself for trial upon his country ; ' which is explained and referred by the clerk of the court, to be meant of the Jury, saying to them, ' which country you are.'

Jurym. Well then, what is the part of the king's justices, or the court ? what are they to take cognizance of, or do, in the trials of men's lives, liberties, and properties ?

Barr. Their office, in general, is to do equal justice and right : particularly,

I. To see that the Jury be regularly returned and duly sworn.

II. To see that the prisoner (in cases where it is permissible) be allowed his lawful challenges.

III. To advise by law, whether such matter may be

given in evidence, or not ; such a writing read, or not ; or such a man admitted to be a witness, &c.

IV. Because by their learning, and experience, they are presumed to be best qualified to ask pertinent questions, and, in the most perspicuous manner, soonest to sift out truth from amongst tedious impertinent circumstances and tautologies : they therefore commonly examine the witnesses in the court ; yet not excluding the Jury, who of right may, and, where they see cause, ought to ask them any necessary questions ; which undoubtedly they may lawfully do with modesty and discretion, without begging any leave. For if asking leave be necessary, it implies in the court a right when they list to deny it ; and how then shall the Jury know the truth ? And since we see, that council, who too often (—*Pudet hæc opprobria nobis*) for their fees strive only to baffle witnesses, and stifle truth, take upon them daily to interrogate the evidence ; it is absurd to think that the Jurors should not have the same privilege who are upon their oaths, and proper judges of the matter.

V. As a discreet and lawful assistant to the Jury, * they do often recapitulate and sum up the heads of the evidence : but the Jurors are still to consider whether it be done truly, fully and impartially ; for one man's memory may sooner fail than twelve's. He may likewise state the law to them ; that is, deliver his opinion where the case is difficult, or they desire it. But since, *ex facto jus oritur*, all matter of law arises out of matter of fact, so that till the fact is settled there is no room for law : therefore all such discourses of a judge

* Vaughan's Reports in Bushell's case, fol. 114.

to a Jury are, or ought to be, hypothetical, not coercive ; conditional, and not positive, viz : ' If you find ' the fact thus or thus' (still leaving the Jury at liberty to find as they see cause) ' then you are to find for the plaintiff ; but if you find the fact thus, or thus, then ' you are to find for the defendant, or the like ;' guilty, or not guilty, in cases criminal.

Lastly, they are to take the verdict of the Jury, and thereupon to give judgment according to law. For the office of a judge (as Coke well observes) is *jus dicere*, not *jus dare* ; not to make any laws by strains of wit, or forced interpretations ; but plainly, and impartially to declare the law already established. Nor can they refuse to accept the Jury's verdict when agreed : for if they should, and force the Jury to return, and any of them should miscarry for want of accommodation, it would undoubtedly be murder ; and in such case the Jury may, without crime, force their liberty ; because they are illegally confined, (having given in their verdict, and thereby honestly discharged their office,) and are not to be starved for any man's pleasure.

Jurym. But I have been told, that a Jury is only judge of naked matter of fact, and are not at all to take upon them to meddle with, or regard, matter of law, but leave it wholly to the court.

Barr. 'Tis most true, Jurors are judges of matters of fact : that is their proper province, their chief business ; but yet not excluding the consideration of matter of law, as it arises out of, or is complicated with, and influences the fact. For to say, they are not at all to meddle with, or have respect to, law in giving their verdicts, is not only a false position, and contradicted by

every day's experience ; but also a very dangerous and pernicious one ; tending to defeat the principal end of the institution of Juries, and so subtilly to undermine that which was too strong to be battered down.

I. It is false : For, though the direction, as to matter of law separately, may belong to the judge, and the finding the matter of fact does, peculiarly, belong to the Jury ; yet must your Jury also apply matter of fact and law together ; and from their consideration of, and a right judgment upon both, bring forth their verdict : For do we not see in most general issues, as upon not guilty—pleaded in trespass, breach of the peace, or felony, though it be matter in law whether the party be a trespasser, a breaker of the peace, or a felon ; yet the Jury do not find the fact of the case by itself, leaving the law to the court ; but find the party guilty, or not guilty, generally ? So as, though they answer not to the question singly, what is law ? yet they determine the law, in all matters, where issue is joined. So likewise is it not every day's practice, that when persons are indicted for murder, the Jury not only find them guilty, or not guilty ; but many times, upon hearing, and weighing of circumstances, bring them in, either guilty of murder, manslaughter, *per infortunium*, or *se defendendo*, as they see cause ? Now do they not, herein, complicate both law and fact ? And to what end is it, that when any person is prosecuted upon any statute, the statute itself is usually read to the Jurors, but only that they may judge, whether, or no, the matter be within that statute ? But to put the business out of doubt, we have the suffrage of that oracle of law, Littleton, who in his *Tenures*, sect. 368. declares, 'That if a Jury

will take upon them the knowledge of the law upon the matter, they may.' Which is agreed to likewise by Coke in his comment thereupon*. And therefore it is false to say that the Jury hath not power, or doth not use frequently to apply the fact to the law; and thence taking their measures, judge of, and determine, the crime, or issue, by their verdict†.

2. As Juries have ever been vested with such power by law, so, to exclude them from, or disservice them of the same, were utterly to defeat the end of their institution‡. For then, if a person should be indicted for doing any common innocent act, if it be but clothed, and disguised, in the indictment, with the name of

* Before the present dispute arose, an able writer of our own times considers this, as a settled and allowed rule. See Blackstone's Commentaries, vol. I. p. 6. vol. III. p. 377. 378. particularly vol. IV. p. 354, 355. 4th ed.

† Not only the express assertion of lawyers—and the practice of the courts, prove, that Juries are authorized to determine the law, so far as it relates to the fact; but, in the third place, the words, in which verdicts must be given, indicate, that they have this power. If Juries had been appointed to judge of facts only, the words 'done,' or 'not done,' or words of a like import, would have been substituted for the words 'guilty,' or 'not guilty.' However, as our ancestors have placed it in their option to determine the law, so far as it is connected with the fact; the language of their verdicts comprehends, when necessary, their sentiments upon both. If any action is said to be criminal, it is necessary to determine whether the action happened:—So that when a Jury declares that a man is guilty, the fact is implied; because they cannot affix guilt, where there is no fact. When a Jury declares a man not guilty, the determination of the fact is left uncertain; because it is unnecessary; for the law concerns itself with actions, only so far as they are criminal.

‡ From the doctrine, that Juries, in the case of libels, are not judges of law, as well as fact, necessarily flows the following absurdity; viz. that it is the duty of Juries to declare men guilty, or not guilty, in whom they perceive neither guilt, or innocence. —Again: If, because a circumstance is established as a fact, it is to be reputed as a crime, every incident which happens, is a crime. Now, if printing and publishing only be criminal, it is criminal to print and publish the Book of Common Prayer, and the Bible.

treason, or some other high crime, and proved, by witnesses, to have been done by him ; the Jury, though satisfied in conscience, that the fact is not any such offence as it is called, yet because (according to this fond opinion) they have no power to judge of law, and the fact charged is fully proved, they shall, at this rate, be bound to find him guilty : and being so found, the judge may pronounce sentence against him, for he finds him a convicted traitor, &c. by his peers. And thus, as a certain physician boasted, that he had killed one of his patients with the best method in the world ; so here should we have an innocent man hanged, drawn, and quartered, and all according to law.

Jurym. God forbid that any such thing should be practised ! and indeed I do not very fully understand you.

Barr. I do not say it ever hath been, and I hope it never will be practised : but this I will say, that according to this doctrine, it may be ; and consequently Juries may thereby be rendered, rather a snare, or engine of oppression, than any advantage or guardian of our legal liberties against arbitrary injustice ; and made mere properties to do the drudgery, and bear the blame

It is hard to say, on what principles this right of Juries can be disputed. " If Jurymen, because not bred to the law, are supposed incapable of knowing what is, or what is not, law ; it follows that none but lawyers can justly be punished for a breach of the law : for, surely, that man is rather unfortunate, than faulty, who ignorantly transgresses the law."—besides, if it is wise to vest the determination of law, where it concerns facts, in the Jury, when any civil or criminal suit is in question ; certainly it is wise to entrust the Jury with the same power, in all suits, which particularly concern the state : because, in such suits, the determination is always of more consequence, and judges are more likely to be under an influence, which is injurious to the rights of the people.

of unreasonable prosecutions. And since you seem so dull as not to perceive it, let us put an imaginary case ; not in the least to abet any irreverence towards His Majesty, but only to explain the thing, and shew the absurdness of this opinion.—Suppose then a man should be indicted, for that he is a false traitor, not having the fear of God before his eyes, &c. did, traitorously, presumptuously, against his allegiance, and with an intent to affront His Majesty's person, and government, pass by such, or such, a royal statue, or effigies, with his hat on his head, to the great contempt of His Majesty and his authority, the evil example of others, against the peace, and His Majesty's crown and dignity. Being hereupon arraigned, and having pleaded not guilty, suppose that sufficient evidence should swear the matter of fact laid in the indictment, viz: that he did pass by the statue, or picture, with his hat on ; now imagine yourself one of the Jury that were sworn to try him ; what would you do in the matter ?

Jurym. Do ? why I should be satisfied in my conscience, that the man had not, herein, committed any crime, and so I would bring him in, not guilty.

Barr. You speak as any honest man would do : but I hope you have not forgot the point we were upon. Suppose therefore, when you thought to do thus, the court, or one of your brethren, should take you up, and tell you, that it was out of your power so to do : “ for look “ ye (saith he) my masters ! we Jurymen are only to “ find matter of fact ; which being fully proved, as in “ this case before us it is, we must find the party guilty. Whether the thing be treason, or not, does not

"belong to us to enquire ; it is said so here, you see, "in the indictment ; and let the court look to that, they "know best. We are not judges of law. Shall we meddle with niceties and punctilios, and go contrary to "the directions of the court ? So perhaps we shall bring "ourselves into a *Præmunire* (as they say) and perhaps "never be suffered to be Jurymen again. No, no, "the matter of fact you see is proved, and that is our "business ; we must go according to our evidence, we "cannot do less ; truly it is something hard, and I pity "the poor man, but we cannot help it," &c. After these notable documents, what would you do now ?

Jurym. I should not tell what to say to it ; for I have heard several ancient Jurymen speak to the very same effect, and thought they talked very wisely.

Barr. Well then, would you consent to bring in the man guilty ?

Jurym. Truly I should be somewhat unwilling to do it ; but I do not see which way it can be avoided, but that he must be found guilty of the fact.

Barr. God keep every honest body from such Jurymen ! Have you no more regard to your Oath ? to your conscience ? to Justice ? to the life of a man ?

Jurym. Hold ! hold ! perhaps we would not bring him guilty generally, but only guilty of the fact ;* finding no more, but, guilty of passing by the statue with his hat on.

Barr. This but poorly mends the matter, and signifies little or nothing : for such a finding hath generally

* Is not this exactly similar to a late verdict given in the case of the King against *Woodfall* ?

been refused by the court, as being no verdict ; though, it is said, it was lately allowed somewhere in a case that required favour. But, suppose it were accepted, what do you intend should become of the prisoner ? Must not he be kept in prison till all the Judges are at leisure, and willing, to meet, and argue the business ? Ought you not, and what reason can you give why you should not, absolutely acquit, and discharge him ? Nay, I do aver, you are bound, by your oaths, to do it ; by saying with your mouths to the court, what your conscience cannot but dictate to yourselves, ‘ not guilty.’ For pray consider, are you not sworn, that you will well and truly try, and true deliverance* make ? There is none of this story, of matter of fact, distinguished from law, in your oath ; but you are, ‘ well,’ that is, fully, and ‘ truly,’ that is impartially, to try the prisoner. So that if upon your consciences, and the best of your understanding, by what is proved against him, you find he is guilty of that crime wherewith he stands charged, that is, deserving death, or such other punishment as the law inflicts upon an offence so denominated ; then you are to say, he is guilty. But if you are not satisfied, that either the act he has committed, was treason, or other crime, (though it be never so often called so ;) or that the act itself, if it were so criminal, was not done : then what remains, but, that you are to acquit him ? for the end of Juries is to preserve men from oppression ; which may happen, as well by imposing, or ruining them for that as a crime, which indeed is none, or at least not such, or so great, as is pretended ; as by charging them

* Of their verdict, this is meant.

with the commission of that, which, in truth, was not committed. And how do you well, and truly try, and true deliverance make, when indeed you do but deliver him up to others to be condemned, for that, which yourselves do not believe to be any crime?

Jurym. Well; but the supposed case is a case unsupposable. It is not to be imagined, that any such thing should happen; nor to be thought, that the judges will condemn any man, though brought in guilty by the Jury, if the matter, in itself, be not so criminal by law.

Barr. It is most true, I do not believe that ever that case will happen. I put it as a thing of apparent absurdity, that you might the more clearly observe the unreasonableness of this doctrine; but withal I must tell you, that it is not impossible that some other cases may really happen, of the same, or the like nature, though more fine, and plausible. And, though we apprehend not, that during the reign of His Majesty that now is, (whose life God long preserve) any Judges will be made, that would so wrest the law; yet that security is there, but that some successors may not be so cautious in their choice? and, though our benches of judicature be at present furnished with gentlemen of great integrity, yet, there may one day happen some Tresilian, or kinsman of Empson's, to get in, (for what has been, may be) who, Empson-like, too, shall pretend it to be for his master's service to increase the number of criminals, that his coffers may be filled with fines, and forfeitures: and then such mischiefs may arise. And Juries, having upon confidence parted with their just privileges, shall then, too late, strive to re-assume them, when the num-

ber of ill precedents shall be vouched to enforce that as of right, which in truth was at first a wrong, grounded on easiness and ignorance. Had our wise, and wary ancestors, thought fit to depend so far upon the contingent honesty of judges, they needed not to have been so zealous to continue the usage of Juries.*

Jurym. Yet still I have heard, that in every indictment, or information, there is always something of form, or law, and, something else, of fact; and it seems reasonable, that the Jury should not be bound up nicely to find every formality therein expressed, or else to acquit (perhaps) a notorious criminal. But if they find the essential matter of the crime, then they ought to find him guilty.

Barr. You say true, and therefore must note, that there is a wide difference to be made between words of course, raised by implication of law, and essential words, that either make, or really aggravate, the crime charged. The law does suppose and imply every trespass, breach of the peace, every felony, murder, or treason, to be done *Vit Armis*, with force, and arms, &c. Now, if a person be indicted for murder by poison, and the matter proved; God forbid the Jury should scruple the finding him guilty upon the indictment, merely because they do not find that part of it, as to force, and arms, proved! for that is implied as a necessary, or allowable, fiction of law.

* If the reader is desirous of seeing the many unhappy consequences to which such a dependence would subject us, let him read the second postscript to the letter to Almond, in matter of libel. There are many observations in that publication, which give great confirmation to the doctrines here laid down, and shew the writer to have been possessed of exceedingly great abilities, judgment, and learning.

But on the other side, when the matter in issue, in itself, and taken as a naked proposition, is of such a nature, as no action, indictment, or information will lie for it singly ; but it is worked up by special aggravations into matter of damage, or crime ; (as that it was done to scandalize the government, to raise sedition, to affront authority, or the like, or with such, or such, an evil intent :) If these aggravations, or some overt act to manifest such ill design, or intention, be not made out by evidence, then ought the Jury to find the party, not guilty. For example :

Bishop Latimer (afterwards a martyr in bloody Queen Mary's days, for the Protestant religion) in his sermon preached before the most excellent King Edward VI. delivered these words : ' I must desire your grace to hear poor men's suits yourself.' The saying is now, ' That money is heard every where : ' ' If he be rich, he shall soon have an end of his matter.' ' Others are fain to go home with weeping tears for any help they can obtain at any judge's hand. Hear men's suits yourself, I require you in God's behalf ; and put them not to the hearing of these velvet coats, these up-skips. Amongst all others, one especially moved me at this time to speak : This it is, Sir : A gentewoman came and told me, that a great man keepeth certain lands of hers from her, and will be her tenant in spite of her teeth. And that in a whole twelve month she could not get but one day for the hearing of her matter, and the same day, when it should be heard, the great man brought on his side a great sight of lawyers for his council. The gentewoman had but one man of law,

and the great man shakes him so, that he cannot tell what to do. So that when the matter came to the point, the judge was a means to the gentlewoman, that she should let the great man have a quietness in her land. I beseech your grace, that ye would look to these matters.

‘ And you, poud judges ! hearken what God saith in his holy book ; *Audite illos, ita parvum, ut magnum*, hear them (saith he) the small as well as the great ; the poor as well as the rich ; regard no person, fear no man. And why ? *Quia Domini judicium est*, the judgement is God’s. Mark this saying, thou proud judge ; the devil will bring this sentence against thee at the day of doom. Hell will be full of these judges, if they repent not, and amend : they are worse than the wicked judge that Christ speaketh of, Luke the 19th, that neither feared God, nor the world. Our judges are worse than this judge was ; for they will neither hear men for God’s sake, nor fear of the world, nor importunateness, nor any thing else ; yea, some of them will command them to * ward if they be importunate.— I heard say that when a suitor came to one of them, he said, ‘ What fellow is it, that giveth these folks counsel to be so importunate ? He deserves to be punished, and committed to ward.’ ‘ Marry, Sir, punish me then ; it is even I that gave them counsel. I would gladly be punished in such a cause ; and if you amend not, I will cause them to cry out upon you still ; even as long as I live.’ These are the very words of that good bishop, and martyr, father Latimer : ‘ But now-a-days the judges be afraid to

* Prison.

hear a poor man against the rich; inasmuch, they will either pronounce against him, or so drive off the poor man's suit, that he shall not be able to go through with it.†

Jurym. Truly they are somewhat bold, but I think very honest ones. But what signify they to our discourse?

Barr. Only this; suppose the judges of those times, thinking themselves aggrieved by such his freedom, should have brought an indictment against him, setting forth, that 'falsely, and maliciously, intending to scandalize the government, and the administration of justice, in this realm, and to bring the same into contempt, he did speak, publish, and declare the false, and scandalous, words before recited.'

Jurym. I conceive the judges had more wit than to trouble themselves about such a business.

Barr. That is nothing to the purpose; but suppose, I say, by them, or any body else, it had been done; and his speaking the words had been proved; and you had then been living, and one of the jury?

Jurym. I would have pronounced him not guilty, and been starved to death before I would have consented to a contrary verdict; because the words in themselves are not criminal, nor reflecting upon any particulars; and as for what is supposed to be laid in the indictment or information, 'that they were published, or spoken, to scandalize the government, and the administration of justice, or to bring the same into contempt,' nothing of that appears.

Barr. You resolve, as every honest, understanding, conscientious man would do in the like case; for when a man is prosecuted for that which, in itself, is no

† See also Letimer's Third Sermon.

crime, how dreadfully soever it may be set out, (as the inquisitors in Spain use to clothe innocent protestants, whom they consign to the flames, with *Sambenitos*, garments all over repainted with devils, that the people beholding them in so hellish a dress, may be so far from pitying them, that they may rather condemn them in their thoughts as miscreants not worthy to live, although in truth they know nothing of their cause ;)—yet I say, notwithstanding any such bugbear artifices, an innocent man ought to be acquitted, and not he and all his family ruined, and perhaps utterly undone, for words or matters, harmless in themselves, and possibly very well intended, but only rendered criminal, by being thus hideously dressed up, and wrested with some far-fetched, forced, and odious construction.

Jurym. This is a matter well worthy the consideration of all Juries ; for indeed I have often wondered to observe the adverbs in declarations, indictments, and informations, in some cases to be harmless vinegar and pepper, and in others, henbane steeped in aquafortis.

Barr. That may easily happen, where the Jury does not distinguish legal implications, from such as constitute, or materially aggravate, the crime ; for if the Jury shall refuse to find the latter in cases where there is not direct proof of them, viz. that such an act was done falsely, scandalously, maliciously, with an intent to raise sedition, defame the government, or the like, their mouths are not to be stoppt, nor their consciences satisfied with the court's telling them --You have nothing to do with that ; it is only matter of form, or matter of law ; you are only to examine the fact, whether he

spoke such words, wrote or sold such book, or the like.* For now, if they should ignorantly take this for an answer, and bring in the prisoner guilty, though they mean and intend, of the naked fact, or bare act, only; yet the clerk recording it demands a further confirmation, saying to them, thus: 'Well then, you say A. B. is guilty of the trespass, or misdemeanor, in manner and form as he stands indicted; and so you say all?' To which the foreman answers for himself and his fellows, 'Yes.' Whereupon the verdict is drawn up.—*Juratores super sacramentum suum dicunt,* &c. 'The jurors do say upon their oaths, that A. B. maliciously, in contempt of the king and the government, with an intent to scandalize the administration of justice, and to bring the same into contempt, or to raise sedition,' &c. (as the words before were laid,) spake such words, published such a book, or did such an act, against the peace of our lord the king, his crown and dignity.

Thus a VERDICT, so called in law, *quasi veritatis*, because it ought to be the voice or saying of TRUTH† itself, may become composed in its material part of falsehood. Thus twelve men ignorantly drop into a perjury. And will not every conscientious man tremble to pawn his soul under the sacred and dreadful solemnity of an oath, to attest and justify a lye upon record to all posterity? besides the wrong done to the

* A prophet!—Our modern patriots have often been the subjects of ridicule, on account of their apprehensions; however, we have lived to see the completion of several predictions here made by one of our ancestors; and our posterity may, in the same manner have reason to be convinced that those made in our times are not entirely without foundation.

† *Vere dictum.*

prisoner, who thereby, perhaps, comes to be hanged, and so the jury, *in foro conscientiae*, are certainly guilty of his murder; or at least he is, by fine or imprisonment, undone, with all his family, whose just curses will fall heavy on such unjust Jurymen, and all their posterity, who, against their oaths and duty, occasioned their causeless misery. And is all this, think you, nothing but a matter of formality?

Jurym. Yes, really, a matter of vast importance, and sad consideration; yet I think you charge the mischiefs done by such proceedings a little too heavy upon the Jurors. Alas, good men! they mean no harm; they do but follow the directions of the court: if any body ever happen to be to blame in such cases, it must be the judges.

Barr. Yes, forsooth! that is the Jurymen's common plea; but do you think it will hold good in the court of Heaven? It is not enough that we mean no harm, but we must do none neither, especially in things of that moment. Nor will ignorance excuse, where it is affected, and where duty obliges us to inform ourselves better, and where the matter is so plain and easy to be understood.

As for the judges, they have a fairer plea than you, and may quickly return the burthen back upon the Jurors; for 'we,' may they say, 'did nothing but our duty, according to usual practice. The Jury, his peers, had found the fellow guilty, upon their oaths, of such an odious crime, and attended with such vile presumptions, and dangerous circumstances. They are judges; we took him as they presented him to us; and according to our duty, pronounced the sentence that the law

inflicts in such cases, or set a fine, or ordered corporal punishment upon him, which was very moderate, considering the crime laid in the indictment, or information, and of which they had so sworn him guilty. If he were innocent, or not so bad as represented, let his destruction lie upon the jury, &c.' At this rate, if ever we should have an unconscionable, Judge might he argue; and thus the guilt of the blood, or ruin, of an innocent man, when it is too late, shall be bandied to and fro, and shuffled off from the Jury to the Judge, and from the Judge to the Jury, but really sticks fast to both, but especially on the Jurors; because the very end of their institution was to prevent all dangers of such oppression; and in every such case, they do not only wrong their own souls, and irreparably injure a particular person, but also basely betray the liberties of their country in general. For as, without their ill compliance and act, no such mischief can happen, so by it, ill precedents are made, and the plague is increased; honest Juries are disheartened, or seduced by custom from their duties; just privileges are lost by disuser; and perhaps within a while, some of themselves may have an hole picked in their coats, and then they are tried by another Jury just as wise, and honest, and so deservedly come to smart under the ruining effects and example of their own folly and injustice.

Jurym. You talk of folly, and blame Jurymen, when indeed they cannot help it. They would sometimes find such a person guilty, and such an one innocent, and are persuaded they ought so to do; but the court over-rules, and forces them to do otherwise.

Barr. How, I pray?

Jurym. How! why, did you never hear a Jury threatened to be fined or imprisoned, if they did not comply with the sentiments of the court?

Barr. I have read of such doings, but I never heard or saw it done: and indeed I do not doubt but our seats of justice are furnished with both better men, and better lawyers, than to use any such menaces, or duress; for undoubtedly it is a base and very illegal practice. But, however, will any man that fears God, say, that is but an honest heathen, debauch his conscience, and forswear himself, do his neighbour injustice, betray his country's liberties, and consequently enslave himself and his posterity; and all this merely because he is hectored and threatened a little?

Jurym. I know it should not sway with any; but alas! a prison is terrible to most men, whatever the cause be; and the fine may be such, if one shall refuse to comply, as may utterly ruin one's family.

Barr. Fright not yourself; there is no cause for this ague-fit to shake your conscience out of frame: if you are threatened, 'tis but *brutum fulmen*, lightning without a thunderbolt, nothing but big words; for it is well known, that THERE IS NEVER A JUDGE IN ENGLAND THAT CAN FINE OR IMPRISON ANY JURYMEN IN SUCH A CASE.

Jurym. Good Sir! I am half ashamed to hear a barrister talk thus. Have not some in our memory been fined and imprisoned? And sure that which has actually been done, is not altogether impossible.

Barr. Your servant, Sir! Under favour of your mighty wisdom and experience, when I said no judge

could do it, I spoke the more like a barrister: for it is a maxim in law—*Id possumus, quod Jure possumus*; ‘a man is said to be able to do only so much as he may lawfully do.’ But such fining and imprisoning cannot lawfully be done; the judges have no right or power, by law, to do it; and therefore it may well be said, they cannot, or are not able to do it.

And whereas you say, that some Juries in our memory have been fined and imprisoned, you may possibly say true; but it is as true that it hath been only in our memory; for no such thing was practised in ancient times; for so I find it asserted by a late learned Judge*, in these positive words: ‘No case can be offered, either before attainments granted in general, or after, that ever a Jury was punished by fine and imprisonment by any Judge for not finding according to their evidence, and his direction, until *Popham’s* time; nor is there clear proof, that he ever fined them for that reason, separated from other misdemeanours.’ And fol. 152, he affirms, ‘That no man can shew, that a Jury was ever punished upon an information, either at law, or in the Star-chamber, where the charge was only for finding against their evidence, or giving an untrue verdict, unless imbracery, subornation, or the like were joined.’ So that, you see, the attempt is an innovation, as well as unjust; a thing unknown to our fore-fathers, and the ancient sages of the law, and therefore so much the more to be watched against, resisted, & suppressed whilst young, lest in time this crafty cockatrice’s egg, hatched and fostered by ignorance, and

*Lord chief justice Vaughan, in his Reports, fol. 146.

pusillanimous compliance, grow up into a serpent too big to be mastered, and so blast, and destroy the first-born of our English freedoms. And indeed, blessed be God, it hath hitherto been rigorously opposed as often as it durst crawl abroad ; being condemned in parliament, and knocked on the head by the resolutions of the judges upon solemn argument ; as, by and by, I shall demonstrate.

Jurym. Well, but are Jurors not liable then to fine or imprisonment, in any case whatsoever ?

Barr. Now you run from the point ; we were talking of giving their verdict, and you speak of any case whatsoever. Whereas you should herein observe a necessary distinction, which I shall give you in the words of that learned Judge last recited * ; ‘ Much of the office of Jurors, in order to their verdict, is *Ministerial* ; as not withdrawing from their fellows after they are sworn ; not receiving from either side evidence not given in court ; not eating and drinking before their verdict ; refusing to give a verdict, &c. wherein if they transgress, they may be finable. But the verdict itself, when given, is not an act ministerial, but *Judicial*, and, supposed to be, according to the best of their judgment ; for which they are not finable, nor to be punished, but by attain ;’ that is, by another Jury, in cases where an attain lies, and where it shall be found that, *wilfully*, they give a verdict, false and corrupt.

Now that Juries, otherwise, are in no case punishable, nor can, for giving their verdict according to their consciences, and the best of their judgment, be legally

* Vaughan's Reports, fol. 152.

fined and imprisoned by any Judge, on colour of not going according to their evidence, or finding contrary to the directions of the court ; is a truth, both founded on unanswerable reasons, and confirmed by irrefragable authorities.

Jurym. Those I would gladly hear.

Barr. They are many, but some of the most evident are these that follow. As for reasons :—

I. A Jury ought not to be fined, or imprisoned, because they do not follow the Judge's directions ; for if they do follow his directions, they may yet be attainted ; and to say they gave their verdict according to his directions, is no bar, but the judgment shall be reversed, and they punished for doing that, which if they had not done, they should, by this opinion, have been fined, and imprisoned, by the Judge.—Which is unreasonable.

II. If they do not follow his Direction, and be therefore fined, yet they may be attainted, and so they should be doubly punished by distinct judicatures for the same offence ; which the common law never admits.

III. To what end is the Jury to be returned out of the vicinage, that is the neighbourhood, whence the issue ariseth ? To what end must hundredors be of the Jury, whom the law supposeth to have nearer knowledge of the fact than those of the vicinage in general ? To what end are they challenged so scrupulously to the array and poll ? To what end must they have such a certain freehold, and be *probi, & legales, homines*, and not of affinity with the parties concerned, &c. If after all this, they implicitly must give a verdict by the dictates, and authority of another man, under pain of fines,

and imprisonment, when sworn to do it according to the best of their own knowledge? A man cannot see by another's eye, nor hear by another's ear; no more can a man conclude, or infer, the thing to be resolved by another's understanding or reasoning, unless all men's understandings were equally alike. And if, merely in compliance, because the Judge says thus, or thus, a Jury shall give a verdict; though such their verdict should happen to be right, true, and just; yet they being not assured it is so from their own understanding, are *forsworn*, at least *in foro conscientie*.

IV. Were Jurors so finable, then every mayor, and bailiff of corporations, all stewards of leets, justices of peace, &c. whatever matters are tried before them, shall have verdicts to their minds, or else fine, and imprison the Jurors till they have; so that such must be either pleased, humoured, or gratified, else no justice, or right is to be had in any court.

V. Whereas a person by law may challenge the sheriff, or any Juryman, if of kin to his adversary; yet he cannot challenge a mayor, recorder, justice, &c. who it is possible will have a verdict for their kinsman, or against their enemy, or else fine and imprison the Jury till they have obtained it; so that by this means our lives, liberties, and properties, shall be solely tried by, and remain at the arbitrary disposal of every mercenary, or corrupted justice, mayor, bailiff, or recorder, if any such should, at any time, get into office.

VI. 'Tis unreasonable that a Jury should be finable on pretence of their going against their evidence; because it can never be tried, whether or no in truth they

did find with, or against, their evidence, by reason no writ of error lies in the case.

VII. Were Jurymen liable to such arbitrary fines, they would be in a worse condition than the criminals tried by them ; for in all civil actions, informations, and indictments, some appeals, or writs of false judgment, or of error, do lie into superior courts to try the regular proceedings of the inferior. But here can be no after-trial, or examination ; but the Jurymen, if fining at all were lawful, must either pay the fine, or lie by it ; without remedy to decide, whether in this particular case he were legally fined, or not.

VIII. Without a fact agreed, it is as impossible for a Judge, or any other, to know the law, relating to that fact, or direct concerning it, as to know an accident that hath no subject, for as, where there is no law, there is no transgression, so where there is no transgression, there is no place for law : for ' the law, ' saith Divine authority, ' is made for the transgressor.' And as Coke tells us, *Ex facto jus oritur* ; upon stating the fact, or transgression matter of law doth arise, or grow out of the root of the fact. Now the Jury being the sole judges of fact, and matter in issue before them, not finding the fact on which the law should arise, cannot be said to find against law, which is no other than a superstructure on fact ; so to say that they have found against the law, when no fact is found is absurd ; an expression insignificant, and unintelligible. — For no issue can be joined of matter in law ; no Jury can be charged with the trial of matter in law barely ; no evidence ever was, or can be, given to a Jury, of what is law, or not : nor can any such oath be given to,

or taken by a Jury, to try matter in law ; nor does an attain lie for such oath, if false, &c. But if, by finding against the directions of the court in matter of law, shall be understood, that if the judge having heard the evidence given in court, (for he can regularly know no other, though the Jury may) shall tell the Jury upon this evidence, the law is for the plaintiff, or for the defendant, and the Jury are, under pain of fine, and imprisonment, to find accordingly ; then it is plain, the Jury ought of duty so to do. Now if this were true, who sees not that the Jury is but a troublesome delay, of great charge, much formality, and no real use in determining right, and wrong, but mere echoes to sound back the pleasure of the court ; and consequently, that trials by them might be better abolished than continued ? which is at once to spit folly in the faces of our venerable ancestors, and enslave our posterity.

IX. As the judge can never direct what the law is in any matter controverted, without first knowing the fact ; so he cannot possibly know the fact but from the evidence which the Jury have ; but he can never fully know what evidence they have ; for besides what is sworn in court, (which is all that the judge can know) the Jury, being of the neighbourhood, may, and oft-times do, know something of their own knowledge, as to the matter itself, the credit of the evidence, &c. which may justly sway them in delivering their verdict ; and which self-knowledge of theirs is so far countenanced by law, that it supposes them capable thereby to try the matter in issue, and so they must, though no evidence were given, on either side, in court. As when any man is indicted, and no evidence comes against him, the direction of the court always is, • You

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are to acquit him, unless of your own knowledge you know him guilty ;' so that even, in that case, they may find him guilty, without any witnesses. Now how absurd is it to think, that any Judge has power to fine a Jury for going against their evidence, when he that so saith, knoweth perhaps nothing of their evidence at all, (as in the last case) or at least but some part of it ? For how is it possible he should lawfully punish them for that which it is impossible for him to know ?

Lastly, Is any thing more common, than for two lawyers, or judges, to deduce contrary and opposite conclusions out of the same case in law ? And why, then, may not two men infer distinct conclusions from the same testimony ? And consequently, may not the Judge and Jury honestly differ in their opinion, or result from the evidence, as well as two judges may, which often happens ? And shall the Jurymen, merely for this difference of apprehension, merit fine and imprisonment, because they do that which they cannot otherwise do, preserving their oath and integrity ? especially when by law they are presumed to know better, and much more of the business than the judge does, as aforesaid.

Are not all these gross contradicting absurdities, and unworthy, by any man that deserves a gown, to be put upon the law of England ; which has ever owned right reason for its parent, and dutifully submitted to be guided thereby ?

Jurym. If the law, as you say, be reason, then undoubtedly this practice of fining of Juries is most illegal, since there cannot be any thing more unreasonable : but what authorities have you against it ?

Barr. You have heard it proved to be a modern upstart encroachment, so you cannot expect any direct or express condemnation of it in ancient times ; because the thing was not then set on foot. And, by the way, though negative arguments are not necessarily conclusive, yet that we meet with no precedents of old of Juries fined for giving their verdict contrary to evidence or the sense of the court, is a violent presumption that it ought not to be done ; for it cannot be supposed that this latter age did first of all discover that verdicts were many times not according to the Judge's opinion and liking. Undoubtedly they saw that as well as we ; but knowing the same not to be any crime, or punishable by law, were so modest and honest as not to meddle with it. However, what entertainment it hath met with, when attempted in our times, I shall shew you in two remarkable cases.

I. when the late Lord Chief Justice Keeling had attempted something of that kind, it was complained of, and highly resented by the then parliament, as appears by this copy of their proceedings thereupon, taken out of their journal, as follows :

Die Mercurii, 11 Decembris, 1667.

‘ The house resumed the hearing of the rest of the report touching the matter of restraint upon Juries, and that upon the examination of divers witnesses in several cases of restraints put upon Juries by the Lord Chief Justice Keeling, and thereupon resolveth as followeth :

‘ First, That the proceedings of the said Lord Chief Justice, in the cases now reported, are innovations in the trial of men for their lives and liberties. And that

he hath used an arbitrary and illegal power, which is of dangerous consequence to the lives and liberties of the people of England, and tends to the introducing of an arbitrary government.

‘Secondly, That in the place of judicature, the Lord Chief Justice hath under-valued, vitified, and contemned MAGNA CHARTA, the great preserver of our lives, freedom, and property.

‘Thirdly, That he be brought to trial in order to condign punishment, in such manner as the house shall judge most fit and requisite.’

Die Veneris, 13 Decembris, 1667.

‘Resolved, &c.

‘That the precedents and practice of fining or imprisoning of Jurors for giving their verdicts, are illegal.’

Here you see it branded in parliament: Next you shall see it formally condemned on a solemn argument by the judges.—The case is thus.

At the sessions for London, Sept. 1670, William Pen, and William Mead, (two of the people commonly called Quakers,) were indicted, ‘for that they, with others, to the number of three hundred, on the 14th Aug. 22 Regis, in Gracechurch-Street, did with force and arms, &c. unlawfully and tumultuously assemble and congregate themselves together, to the disturbance of the peace; and that the said William Pen did there preach, and speak to the said Mead, and other persons, in the open street; by reason whereof a great concourse and tumult of people in the street aforesaid, then and there a long time did remain and continue, in contempt of our said Lord the King, and of his law, to the great

disturbance of his peace, to the great terror and disturbance of many of his liege people and subjects, to the ill example of all others in the like case offenders, and against the peace of our said Lord the King, his crown and dignity.'

The prisoners pleading not guilty, it was proved, that there was a meeting at the time in the indictment mentioned, in Gracechurch Street, consisting of three or four hundred people, in the open street—that William Pen was speaking, or preaching, to them; but what he said the witnesses (who were officers and soldiers sent to disperse them) could not hear.—This was the effect of the evidence; which Sir John Howel, the then recorder, as I find in the print of that trial, was pleased to sum up to the Jury in these words.

'You have heard what the indictment is.—It is for preaching to the people in the street, and drawing a tumultuous company after them, and Mr. Pen was speaking. If they should not be disturbed you see they will go on. There are three or four witnesses that have proved this—that he did preach there, that Mr. Mead did allow of it. After this you have heard by substantial witnesses what is said against them: Now we are UPON THE MATTER OF FACT, WHICH YOU ARE TO KEEP TO, AND OBSERVE AS WHAT HATH BEEN FULLY SWORN, AT YOUR PERIL.'

This trial began on the Saturday; the Jury retiring, after some considerable time spent in debate, came in, and gave this verdict,—'guilty of speaking in Gracechurch-Street.' At which the court was offended, and told them, they 'had as good say nothing;' adding,—'Was it not an unlawful assembly?—you mean he was

speaking to a tumult of people there?' But the foreman saying, what he had delivered was all he had in commission; and others of them affirming, that they allowed of no such words as an 'unlawful assembly' in their verdict; they were sent back again, and then brought in a verdict in writing subscribed with all their hands, in these words: 'We, the Jurors hereafter named, do find William Pen to be guilty of speaking, or, preaching, to an assembly met together in Gracechurch Street, the 14th of August, 1670. And Wm. Mead not guilty of the said indictment.'

* This the court resented still worse, and therefore sent them back again, and adjourned till Sunday morning; but then too they insisted on the same verdict: so the court adjourned till Monday morning; and then the Jury brought in the prisoners generally 'not guilty;' which was recorded, and allowed of. But immediately the court fined them forty marks a man, and to lie in prison till paid.

Being thus in custody, Edward Boshel, one of the said Jurors, on the ninth of November following, brought his Habeas Corpus in the court of Common Pleas. On which the sheriffs of London made return, 'That he was detained by virtue of an order of sessions, whereby a fine of forty marks was set upon him and eleven others, particularly named; and every of them being Jurors sworn to try the issue' joined be-

* NOTE — Though this Jury, for their excellent example of courage, and constancy, deserve the commendation of every good Englishman; yet, if they had been better advised, they might have brought the prisoners in not guilty at first, and saved themselves the trouble, and inconveniencies of these two nights restraint. See State Trials, vol. II. p. 606, in fol. Vide note* to p. 16.

tween the king, and Pen, and Mead, for certain trespasses, contempts, unlawful assemblies, and tumults, and who then, and there, did acquit the said Pen, and Mead, of the same, against the law of this kingdom, and against full, and manifest, evidence, and against the direction of the court in matter of law, of, and upon the premises openly in court to them given, and declared; and that it was ordered they should be imprisoned till they severally paid the said fine, which the said Bushel not having done, the same was the cause of his caption and detention.*

The court coming to debate the validity of this return, adjudged the same insufficient: For, I. The words, 'against full, and manifest, evidence,' was too general a clause: the evidence should have been fully, and particularly, recited; else how shall the court know it was so full and evident? they have now only the judgment of the sessions for it, that it was so: but said the Judges, 'our judgments ought to be grounded upon our own inferences, and understandings, and not upon theirs.'

II. It is not said, that they acquitted the persons indicted against full and manifest evidence, corruptly, and knowing the said evidence to be full and manifest. For otherwise it can be no crime; for that may seem full, and manifest, to the court, which does not appear so to the Jury.

III. The other part of the return, viz: that 'the Jury had acquitted those indicted, against the direction of the court in matter of law,' was also adjudged to be

* See Bushel's Case in Vaughan's Reports at large.

nought, and unreasonable; and the fining the Juries for giving their verdict in any case concluded to be illegal, for the several reasons before recited, and other authorities of law urged to that purpose; and all the precedents, and allegations, brought to justify the fine, and commitment, solidly answered. Whereupon the chief justice delivered the opinion of the court, 'that the cause of commitment was insufficient;' and accordingly the said Bushel, and other his fellow-prisoners, were discharged, and left to the common law for remedy and reparation of the damages, by that tortuous, illegal imprisonment, sustained.

Which case is (amongst others) reported by that learned Judge Sir John Vaughan, at that time lord chief justice of the common pleas; setting forth all the arguments, reasons, and authorities, on which the court proceeded therein: from which I have extracted most of the reasons which I before recited for this point, and for the greatest part, in the very words of that renowned author.

Jurym. This resolution hath, one would think, (as you said) knocked this illegal practice on the head, beyond any possibility of revival; but may it not one day be denied to be law, and the contrary justified?

Barr. No such thing can be done without apparently violating, and subverting, all law, justice, and modesty: for though the precedent itself be valuable, and without further enquiry is wont to be allowed, when given thus deliberately upon solemn debate by the whole court; yet, it is not only that, but the sound, substantial, and everlasting reasons, whereon they grounded such their resolves, that will, at all times,

justify fining of Juries in such cases to be illegal. Besides, as the reporter was most considerable, both in his quality as lord chief justice, and for his parts, soundness of judgment, and deep learning in law ; so such his book of reports is approved, and recommended to the world, (as appears by the page next after the epistle, by the right honourable the present lord chancellor of England ; Sir William Scroggs, now lord chief justice of England ; my lord North, chief justice of the Common Pleas ; and, in a word, by all the judges of England at the time of publishing thereof : so that it cannot be imagined how any book can challenge greater authority, unless we should expect it to be particularly confirmed by act of parliament.

Jurym. You have answered all my scruples ; and since I see the law has made so good provision for Juryman's privileges and safety, God forbid any Juryman should be of so base a temper as to betray that otherwise impregnable fortress, wherein the law hath placed him, to preserve and defend the just rights and liberties of his country, by treacherously surrendering the same into the hands of violence or oppression, though masked under ever so fair stratagems and pretences. For my own part, I shall not now decline to appear according to my summons ; and therefore, (though I fear I have detained you too long already) shall desire a little more of your direction about the office of a Juryman in particular, that I may uprightly, and honestly, discharge the same.

Barr. Though I think, from what we have discoursed, being digested, and improved, by your own reason, you may sufficiently inform yourself ; yet, to gratify

your request, I shall add a few brief remarks, as well of what you ought cautiously to avoid, as what you must diligently pursue, and regard, if you would justly, and truly, do your duty.

First, As to what you must avoid.

I. I am very confident, that you would not willingly violate the oath which you take : but it is possible that there are such, who as frequently break them as take them, through their careless custom on the one hand, or slavish fear on the other ; against whom I would fully caution you ; that you may defend yourself, and others, against any enemies of your country's liberties, and happiness, and keep a good conscience towards God, and towards man.

II. It is frequent, that when Juries are withdrawn, that they may consult of their verdict, they soon forget that solemn oath they took, and that mighty charge of the life and liberty of men, and their estates, whereof then they are made judges ; and that, on their breaths not only the fortunes of the particular party, but perhaps the preservation, or ruin, of several numerous families does solely depend : now I say, without due consideration of all this ; nay sometimes without one serious thought, or consulted reason, offered *pro* or *con*, presently the freeman, or one, or two, that call themselves antient Jurymen, (though in truth they never knew what belongs to the place more than a common school boy,) rashly deliver their opinions, and all the rest, in respect to their supposed gravity, and experience, or because they have the biggest estates, or to avoid the trouble of disputing the point, or to prevent

the spoiling of dinner by delay, or some such weighty reason, forthwith agree blindfold, or else go to holding up of hands, or telling of noses, and so the major vote carries away captive both the reason, and the conscience, of the rest : thus triding with sacred oaths, and putting men's lives, liberties, and properties (as it were) to the hap-hazard of cross or pile. This practice, or something of the like kind, is said to be too customary amongst some Jurors, which occasions such their extraordinary dispatch of the weightiest, or most intricate, matters ; but there will come a time when they shall be called to a severe account for their haste, and negligence ; therefore have a care of such fellow jurors.

III. Such slavish fears attends many Jurors, that let but the court direct to find guilty, or not guilty, though they themselves see no just reason for it ; yea, oft times though their own opinions are contrary, and their consciences tell them it ought to go otherwise ; yet, right, or wrong, accordingly they will bring in their verdict ; and, therefore, many of them never regard seriously the course, and force, of the evidence ; what, and how, it was delivered, more, or less, to prove the indictment, &c. ; but as the court sums it up, they find : as if Juries were appointed for no other purpose but to echo back, what the bench would have done. Such a base temper is to be avoided, as you would escape being foresworn, even though your verdict should be right : for since you do not know it so to be, by your own judgment, or understanding, you have abused your oath, and hazarded your own soul, as well as your neighbour's life, liberty, or property ; because you blindly depend on the o-

passion, or perhaps passion of others, when you were sworn well, and truly, to try them yourselves. Such an implicit faith is near of kin to that of Rome in religion, and, at least, in the next degree, as dangerous.*

IV. There are some that make a trade of being Jurymen; that seek for the office; use means to be constantly continued in it; will not give a disobliging verdict, lest they should be discharged, and serve no more: these standing Jurors have certainly some ill game to play. There are others that hope to signalize themselves, to get a better trade, or some preferment by serving a turn. There are others that have particular piques, and a humour of revenge against such, or such, parties; if a man be but mis-called by some odious name, or said to be of an exploded faction; straight they cry, hang him, find him guilty, no punishment can be too bad for such a fellow; in such a case they think it merit to stretch an evidence on the tender-hooks, and strain a point of law, because they fancy it makes for the interest of the government; as if injustice or oppression could in any case be for the true interest of government, when in truth nothing more weakens or destroys it.— But this was an old stratagem, ‘if thou suffer this man to escape, thou shalt not be Cæsar’s friend:’ when Cæsar

* Though the Judges are likely to be more able than Jurymen, yet Jurymen are likely to be more honest than Judges; especially in all cases where the power of the prerogative, or the rights of the people, are in dispute. Our rights, therefore, both as individuals, and as a people, are more likely to be secure, while Juries follow the result of their own opinion; for less danger will arise from the mistakes of Jurymen, than from the corruption of Judges. Besides, improper verdicts will but seldom occur; since Juries will avail themselves of the abilities and learning, of the Judges, by consulting them upon all points of law; and thus to the advantage of information, may add their own impartiality.

was so far from either needing, or thanking them for, any such base services, that, had he but truly understood them, he would severely have punished their partiality and tyranny.

All these, and the like, pestilential biasses, are to be avoided, and abominated, by every honest Jurymen.

But now as to the positive qualifications requisite.

I. You that are Jurymen, shoud first of all, seriously regard the weight, and importance, of the office; your own souls, other men's lives, liberties, estates, all that in this world are dear to them, are at stake, and in your hands; therefore consider these things well before-hand, and come substantially furnished, and provided, with sound, and we'll grounded, consciences,—with clear minds, free from malice, fear, hope or favour; lest, instead of judging others, thou shouldst work thy own condemnation and stand in the sight of God, the Creator and Judge of all men, no better than a murderer, or perjured malefactor.

II. Observe well the record, indictment, or information that is read, and the several parts thereof both as to the matter, manner, and form.

III. Take due notice of, and pay regard to, the evidence offered for proof of the indictment, and each part of it, as well to manner, and form, as to matter; and if you suspect any subornation, foul practice, or tampering hath been with the witnesses, or that they have any malice, or sinister design; have a special regard to the circumstances, or incoherences, of their tales, and endeavour, by apt questions, to sift out the truth, or discover the villainy. And, for your better

satisfaction, endeavour to write down the evidence, or the heads thereof, that you may the better recall it to memory.

IV. Take notice of the nature of the crime charged, and what law the prosecution is grounded upon, and distinguish the supposed criminal fact, which is proved, from the aggravating circumstances, which are not proved.

V. Remember that in Juries there is no plurality of voices to be allowed: seven cannot over-rule, or, by virtue of majority, conclude five y^e no, nor eleven one. But as the verdict is given in the name of all the twelve, or else it is void; so every one of them must be actually agreeing, and satisfied in his particular understanding, and conscience, of the truth, and righteousness, of such verdict, or else he is forsworn. And, therefore, if one man differ in opinion from his fellows, they must be kept together, till either they, by strength of reason, or argument, can satisfy him, or he convince them. For he is not to be hector'd, much less punished, by the court into a compliance: for the Lord Chief Justice Vaughan says well, "If a man differ in judgment from his fellows, whereby they are kept a day and a night, though his dissent may not in truth be so reasonable as the opinion of the rest that agree; yet, if his judgment be not satisfied, one disagreeing, can be no more criminal, than four, or five, disagreeing with the rest." Upon which occasion the said author recites a remarkable case out of an ancient law book: "A Juror would not agree with his fellows for two days, and being demanded by the judges, if he would agree, said he would first die in prison; whereupon he was com-

* Rep. fol. 151.

1 41 lra. p. 11.

mitted, and the verdict taken ; but upon better advice, the verdict of the eleven was quashed, and the Juror discharged without fine ; and the justices said ' the way was to carry them in carts' (this is to be understood at assizes, where the judge cannot stay, but must remove in such a time into another county) until they agreed, and *not by fining them*. And as the judges erred in taking the verdict of eleven, so they did in imprisoning the twelfth." And therefore, you see, on second thoughts, released him.

VI. Endeavour, as much as your circumstances will permit, at your spare hours to read, and understand, the fundamental laws of the country ; such as Magna Charta, the Petition of Right, the late excellent act for Habeas Corpus's, Horne's Mirror of Justices, Sir Edw. Coke, in his 2d, 3d, and 4th parts of the Institutes of the Law of England, and Judge Vaughan's Reports.— These are books frequent to be had, and of excellent use to inform any reader, of competent apprehension, of the true liberties and privileges, which every Englishman is justly entitled unto, and estated in, by his birthright ; as also the nature of crimes and the punishments severally, and respectively, inflicted on them by law ; the office, and duties, of Judges, Juries, and all officers, and ministers of justice, &c. which are highly necessary for every Juryman, in some competent measure, to know : for the law of England hath not placed trials by Juries, to stand between men, and death or destruction, to so little purpose, as to pronounce men guilty, without regard to the nature of the offence, or to what is to be inflicted thereupon.

For want of duly understanding, and considering, these things, Juries, many times, plunge themselves

into lamentable perplexities ; as it befel the Jury who were the triers of Mr. Udal, a minister, who in the 32d year of Queen Elizabeth, was indicted, and arraigned, at Croydon in Surry,* for high-treason, for defaming the Queen, and her government, in a certain book entitled, 'A Demonstration of the Discipline, &c.' And though there was no direct, but a scrambling shadow of proof ; and though the book, duly considered, contained no matter of treason, but certain words which by a forced construction were laid to tend to the defamation of the government, and so the thing [was] prosecuted under that name ; yet the Jury, not thinking that in pronouncing him guilty, they had upon their oath pronounced him guilty of treason, and to die as a traitor ; but supposing that they had only declared him guilty of making the book ; hereupon they brought him in guilty : but when, after the Judge's sentence of death against him, which they never in the least intended, they found what they had done ; they were confounded in themselves, and would have done any thing in the world to have revoked that unwary pernicious verdict, when, alas ! it was too late. Dr. Fuller has this witty note on this gentleman's conviction, 'that it was conceived rigorous in the greatest, which at best' (saith he) 'is cruel in the least degree.' And it seems so Queen Elizabeth thought it, for she suspended execution, and he died naturally. But his story survives, to warn all succeeding Jurymen to endeavour better to understand what it is they do, and what the consequences thereof will be.

* See State Trials, fol. vol. I. p. 161.

Vth. As there is nothing I more unwilling to encourage you so, particularly, or tempt any so young to a countenance of sin, and mollescence, whereby the spectators of society should avoid being brought to punishment, and so the law seems to be a terror of evil doings, which were to him an horrible perjury, and indeed a foolish pity, or *candide misericordia*, a cruel mercy: (for he is highly inclin'd to the good, that absolves the bad, when real crimes are proved against them;) so I must needs leave to say, that in cases where the matter is dubious, both lawyers, and judges, prescribe rather favour, than rigour. An eminent and learned Judge* of our own has in this advice and wish gone before me: *Multa reuera virgini factiosa non mortali plea evadere, quam iustum unum injuria contrariari*. I verily (with me) had rather twenty evil-doers should escape death through leniency, or pity, than that one innocent man should be unjustly condemned.

I shall conclude with that excellent advice of my lord Coke, which he generally addresses to all Judges, but may no less properly be applied to Jurors:—

“Take not to do right to all, and to deliver your verdict is justly according to the law; for fear is nothing but a betraying of the Accusers that stand against the Fact; and if you shall sincerely execute Justice, be assured of three things:—

I. Though some may malign you, yet God will give you his blessing.

II. That though thereby you may offend great men, and favourites, yet you shall have the favourable kindness of the Almighty and be his favourites.

And lastly, That in ordering against all scandalous complaints, and pragmatic deviers, against you God will defend you as with a shield. For thus the Lord, with peace blessing unto the righteous, and with thy favourable kindness wilt thou defend him as with a shield.” *Palm. v. 12.*

* Forcettus, cap. 27.

† In the Epilogue in 4th Part of his notes.

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